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Docket No. 84-1288

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D., PAULA E., JOHN M., AND DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

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July 18, 1985

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the judgment of the United States Court of Appeals for the Ninth Circuit. In

the instant case, the Ninth Circuit invalidated a stipulation by which plaintiffs' counsel agreed to waive all claims to attorney's fees to which he was entitled under 42 U.S.C §1988 (the Civil Rights Attorneys Fees Awards Act of 1976) ["Fees Act"]* as a condition of the settlement of a class action brought pursuant to 42 U.S.C. §1983 challenging conditions in Idaho's mental health facilities for children. The Court of Appeals held that absent unusual circumstances, plaintiffs' attorneys in class action civil rights suits should not be forced to choose between their clients' interests and their right to fees. To avoid the "possibility of diverging interests of the lawyer and the class" in such cases, it disapproved of simultaneous negotiation of settlement and attorney's fees.

The City of New York is often a defendant in actions brought pursuant to §1983. In 1984,

*The Fees Act provides that courts "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" to be paid by the losing party.

approximately 200 §1983 lawsuits were brought against this City. When engaged in settlement negotiations, it is not the policy of the City to avoid discussion of both the merits of the complaint and attorneys' fees. In fact, in many cases which seek damages, we make lump sum offers of settlement which include both damages and fees. An affirmance of the decision of the Ninth Circuit would thus have a significant, adverse impact on determinations by the City to settle because we would be most reluctant to make an offer of monetary settlement without knowing the extent of our liability, including attorneys' fees.

The Ninth Circuit relied in part on an advisory opinion of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, which concluded that it is unethical in civil rights actions for a defendant's counsel — particularly a government defendant — to condition a settlement offer on the waiver of plaintiff's statutory attorneys' fees or to even negotiate the amount of such fees when negotiating

a settlement on the merits. Opinion 80-94. 36 The Record of the Association of the Bar of the City of New York 507 (1981). A substantial minority of the Committee dissented from a subsequent decision not to reconsider Opinion 80-94. Opinion 82-80. New York Law Journal, December 9, 1983 p. 4 col. 1 (and ehtical opinions in many other jurisdictions have reached a contrary conclusion). While we are not bound to adhere to the advisory opinions of the Bar Association, the opinion, and the Ninth Circuit's endorsement of it, do raise serious questions concerning the validity of our present procedures.

Our experience demonstrates that awards of attorneys' fees can be large and in some cases have even exceeded the monetary damages received by a plaintiff. Therefore, the amount of attorneys' fees is a significant factor to be taken into account in determining whether to settle a case. New York City has a substantial interest in the outcome of this case because a rule prohibiting simultaneous negotiation of settlement and fees may result in cases being tried which need not be tried,

unnecessary congestion in the courts, and the utilization of scarce government resources in cases which can and should be settled.

SUMMARY OF ARGUMENT

We urge in our argument that simultaneous negotiation of merits and attorneys' fees in cases brought pursuant to 42 U.S.C. §1983 does not violate the provisions of the Fees Act, nor does it create an impermissible conflict of interest between plaintiff's attorney and plaintiff. Rather, a prohibition on simultaneous negotiation would significantly impair a defendant's ability to settle §1983 cases. In support of that argument, we show that (1) any rule which prohibits the simultaneous negotiation of relief and attorneys' fees is inconsistent with the principle enunciated by this Court that settlement of civil rights cases should be encouraged, not hindered; (2) in terms of ethical considerations, the settlement of civil rights cases should be treated no differently than settlement of other types of actions; (3) a majority of courts and commentators agree that simultaneous negotiation

of merits and fees, and agreed upon reductions or waivers of fees, should not be prohibited by a blanket rule.

ARGUMENT

THE SIMULTANEOUS NEGOTIATION OF MERITS AND ATTORNEY'S FEES IN CASES BROUGHT PURSUANT TO 42 U.S.C. §1983 DOES NOT VIOLATE THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT AND DOES NOT PRESENT THE PLAINTIFF'S ATTORNEY WITH AN IMPROPER CONFLICT OF INTEREST. IN VIEW OF THE POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DECISIONS OF THIS COURT ENCOURAGING THE SETTLEMENT OF ALL CASES, INCLUDING CIVIL RIGHTS CASES, THE COURT OF APPEALS INCORRECTLY RULED THAT SIMULTANEOUS NEGOTIATIONS IN SUCH CASES IS IMPROPER.

It is not inappropriate in a §1983 action for the parties to discuss both relief and/or damages and attorneys' fees when attempting to reach a settlement. This issue was discussed in dictum in White v. New Hampshire Department of Employment Security, 455 U.S. 455 (1982). In White, this Court held that Fed. Rule Civ. Proc. 59(e), which requires that postjudgment applications

be made within ten days of the entry of judgment, was not applicable to postjudgment requests for attorney fees made pursuant to the Fees Act. In support of his position, the petitioner had argued that prejudgment fee negotiations are improper because they create a conflict of interest between the plaintiff and his attorney by requiring them to divide any lump sum settlement offered by the defendant. The Court rejected that contention (455 U.S. 454 n. 15), noting that "a defendant may have good reason to demand to know his total liability from both damages and fees." While recognizing that prejudgment lump sum offers could raise ethical issues, the Court refused "to hold that no resolution is ever available to ethical counsel."

More recently, this Court considered the question of prejudgment settlement offers in Marek v. Chesny, __ U.S. __, 53 U.S.L.W. 4903 (June 25, 1985). In Marek, which involved a lump sum offer of settlement that included attorneys' fees, it was held that a defendant in a §1983 action is not liable for attorneys' fees incurred after a settlement offer if

the judgment is less than the amount offered in settlement. The Court considered the interplay of Fed. Rule Civ. Proc. 68 and the Fees Act. Rule 68 provides that when an offer of settlement is not accepted and the judgment is ultimately not more favorable than the offer, the "offeree must pay the costs incurred after the making of the offer." The respondent had argued that an offer made under Rule 68 must separately recite the amount that is offered to the defendant in settlement and the amount which is intended to cover costs. He contended that a plaintiff could not reasonably make a determination to settle unless the offer was bifucated. The Court rejected this argument that lump sum offers representing both damages and fees are improper, observing at 53 U.S.L.W. 4905:

> "This construction of the Rule [to allow lump sum offers] best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would be reluctant to make settlement offers. As the Court of Appeals observed, 'many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorneys'

fees in whatever amount the Court might fix on motion of the plaintiff.' 720 F.2d at 477."

The Court held that the word "costs" as used in Rule 68 includes attorneys' fees awardable under the Fees Act. It stated that the inclusion of fees as costs under that rule would not frustrate the objective of §1988 to ensure that civil rights plaintiffs obtain effective access to the courts. Id. at 4906. The Court found that Congress had no intention to place civil rights claims "on any different footing from other civil claims insofar as settlement is concerned." Id. at 4906. Marek recognized that both plaintiffs and defendants benefit by policies which encourage the settlement of lawsuits. Some plaintiffs, the Court observed, receive more in settlement than they would receive had they gone to trial, and, in any event, are spared the stress and burdens of litigation. It concluded: "In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." Id. at 4906.

We respectfully submit that any rule which

prohibits the simultaneous negotiation of relief and attorneys' fees is inconsistent with the principles enunciated in Marek and White. The holding of the Court of Appeals in the instant case discourages rather than encourages the settlement of §1983 cases. It is unreasonable to expect a government to make an offer of settlement which does not represent its total liability, including attorneys' fees. Few attorneys would recommend the settlement of an action if the extent of total liability is unknown.

The adoption of a procedure that encourages trials rather than settlements is, as this Court observed in Marek, harmful to the plaintiffs as well as the defendants. The disincentive to settle would be particularly strong in close cases where the potential damages are relatively small. In such cases, a governement might actually prefer to go to trial on the merits rather than face the possibility of paying an award of attorneys' fees which might be several times larger than the amount paid in damages.

The Ninth Circuit decision would also inhibit the settlement of cases in which equitable relief is sought. Civil rights actions often are brought against a governmental defendant which, as a matter of law, have little likelihood of success. The defendant may be confident that if the matter is fully litigated it will prevail on, for example, jurisdictional grounds. However, as a matter of policy or practical judgment, the defendant may be prepared to dispose of the matter, conditioned upon a waiver or substantial reduction of attorneys' fees. A defendant would not be disposed to settle a case of this nature if its liability for fees must be settled at a later time. Thus, an affirmance of the Ninth Circuit's decision would reduce the number of cases in which plaintiffs obtain relief through settlement.

In terms of ethical considerations, the settlement of a civil rights action should be treated no differently than the settlement of any other type of action. The fact that the plaintiff and his or her attorney must divide a lump sum does not warrant the imposition of a rule banning simultaneous nego-

tiations. Any case in which an attorney's fee depends upon a favorable judgment or settlement presents potential for conflict of interest. However, as this Court observed in White, lump sum offers of settlement are not inherently improper. Prejudgment settlements in contingent fee cases are quite common. Public policy favors the contingent fee as a method for those less financially advantaged to vindicate their rights. See Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097, 1105 (4th Cir., 1977); Valentino v. Rickners Rhederi, 417 F.Supp. 197, 181 (E.D.N.Y., 1976), aff'd, 552 F.2d 466 (2nd Cir., 1977). Indeed, contingent fee arrangements have been endorsed, in part, because "a successful prosecution produces a res out of which the fee can be paid." Code of Professional Responsibility, Ethical Consideration 2-20.

Simultaneous negotiation of damages and attorneys' fees is not uncommon in many other areas of the law, including domestic relations, antitrust, copyright, and stockholder's derivative actions. See

In re Fine Paper Antitrust Litigation, 751 F.2d 562, 583 (3rd Cor., 1984); Shlensky v. Dorsey, 574 F.2d 131, 150 (2rd Cir., 1978); Woodruff v. Woodruff, 176 F.2d (D.C. Cir., 1949).

The opinion below appears to be based upon a misconceived notion concerning the ability of counsel to negotiate settlement of cases in a responsible and ethical manner. There is no reason to presume that, given the rule we urge, attorneys would not act in an ethical manner during settlement negotiations. In any event, the potential for conflict of interest is not so great as to warrant a blanket prohibition against simultaneous negotiations. It is entirely appropriate for an attorney and his or her client to consider counsel fees as a factor in making a determination whether to settle. No attorney is forced to waive or accept a reduced fee which he or she and the client believe is unfair. If a plaintiff and his or her attorney conclude that a settlement offer is inadequate, they may reject it and proceed to trial.

A majority of courts have refused to prohibit

simultaneous negotiation of merits and fees and agreed upon reductions or waivers of fees. The Ninth Circuit has acknowledged that simultaneous negotiation is not inappropriate in all class actions, recognizing that special circumstances may exist which neutralize the potential for impropriety. Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), cert. denied sub nom., Sanchez v. Tucson Unified School Dist., 450 U.S. 912 (1981). Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985) ("of course plaintiff's counsed may elect to waive fees," however, it is questionable whether ethically he may agree to waive fees with the intent of challenging the waiver following judicial approval); Young v. Powell, 729 F.2d 563, 566-567 (8th Cir. 1984) (waiver of the right to claim fees in an employment discrimination class action was inferred from the parties' stipulated dismissal of the action with prejudice, the court stating, "there is no reason offered why the parties should not be bound by their agreement under basic principles of contract."); Gram v. Bank of Louisiana, 691 F.2d 728, 730 (5th

Cir. 1982) (a plaintiff may waive his right to attorneys' fees in a negotiated settlement pursuant the Truth in Lending Act); White v. New Hampshire Department of Employment Security, 629 F.2d 697, 705 (1st Cir. 1980) ("nor . . . do we see anything wrong with requiring the parties to face up to the issue of fees in the settlement negotiations"), rev'd on other grounds 455 U.S. 445; Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) (congress has not prohibited settlements covering payments of attorneys' fees: plaintiffs therefore can waive fees as part of the settlement); Grunin v. International House of Pancakes, 513 F.2d 114, 125 (8th Cir. 1975), cert. den., 423 U.S. 864.

Only one other circuit has adopted a strict rule prohibiting simultaneous negotiation of the merits and of fees. In Prandini v. National Tea Co., 557 F.2d 1015 (1977), the Third Circuit held that in order to avoid the conflict of interest that may result from simultaneous negotiation, settlement of attorneys' fees can occur only after the class damage award for plaintiffs had been settled.

Therefore, the trial court should insist upon two separate settlements. 557 F.2d at 1021.

The Prandini rule completely ignores the defendant's interest in fixing his total liability upon settlement, and thus inhibits the settlement process. This is in contravention of the Third Circuit's own policy favoring private resolution of disputes, noted at 557 F.2d at 1021.*

*The Prandini rule has been criticized by courts and commentators alike. See Attorney's Fees — Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorney's Fees in a Title VII Class Action, 51 Temple Law Quarterly 799, 800, and n. 12. (1978) (a bifurcated settlement procedure ". . . may have undesirable future effects in that the courts will be burdened by an additional judicially supervised proceeding . . . [and] defendants may be deterred from settlement. . . . [T]he bifurcated proceeding may encourage collusion between attorneys in order to effectuate a practical settlement."); Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1207 (1982) (refusal to discuss fees until agreement on all other issues is final "is not necessarily in anyone's interest if it inhibits favorable settlement offers"); Settlement Offers Conditional Upon Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations, 131 U.Pa. L. Rev. 793, 805, n. 90 (1983) (a survey of district court judges in the Third Circuit demonstrates the lack of vitality of the Prandini rule, noting that "some of the judges interviewed suggested that White v. New Hampshire . . . may have modified or overruled Prandini".)

In a recent case, the Third Circuit acknowledged that Prandini may be "more honored in the breach." El Club Del Barrio Inc. v. United Community Corporations, 735 F.2d 98, 101 n. 3 (1984). In discussing simultaneous negotiations, the Court acknowledged that defendants will be unwilling to settle the underlying claim without also resolving counsel fees, which sometimes exceed recovery, and that it would not fulfill the overall goals of the Fees Act to unduly inhibit consensual resolution of disputes.

Most recently, in Moore v. Nat'l Assn. Sec. Dealers, No. 83-2213 (June 4, 1985), the United States Court of Appeals for the District of Columbia declined to follow the approach adopted by the Ninth Circuit in the instant case and the Third Circuit in Prandini.* The Court stated, slip

*The Court considered whether Title VII prohibits a plaintiff from voluntary offering to waive attorney's fees and cost during simultaneous negotiation of merits, fees and costs. The Court did not decide the issue whether defendants may make settlement offers which encompass both merits and fees, but noted that "...it does not appear that plaintiff's counsel is without ability to avoid [this] potential ethical dilemma." (slip. op. at 2).

op. at 23:

> To adopt the Third Circuit rule would deprive Title VII plaintiffs of this right to waive their statutory fees and costs and force them to negotiate first and exclusively on the merits of the case. Defendants in such cases would be more reluctant to settle at this early stage because of uncertainty about their ultimate liability for attorneys' fees and costs. As a result, many more cases would fail settlement and proceed to trial. Thus, a requirement in every case that merits be discussed and settled first would prove ultimately a disservice to plaintiffs as well as defendants.

Above we noted that the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York issued an opinion, over a strong dissent, which concluded that a negotiation of attorneys' fees, prior to a settlement on the merits is inappropriate. For the reasons stated above, we believe that the views expressed in that opinion are incorrect. Rather, we agree with the dissent in Opinion 82-80, that this prohibition is itself "prejudicial to the proper administration of justice", and interferes with the right of defendant to know his exposure, and to insist, if he wishes, on a lump sum settlement

inclusive of attorneys' fees. We note in addition that Opinion 80-94 has not been followed by other bar associations. The State of Georgia Disciplinary Board was persuaded by the dissent in New York City Bar Association Opinion 82-80. Opinion 39 (July 20, 1984); accord Report of the Subcommittee of Lawyer, Member of the Committee on Attorneys' Fees appointed by the Chief Judges of the U.S. District Court and U.S. Court of Appeals for the District of Columbia, Bar Report 4 (Aug/Sept., 1984); see District of Columbia Bar Legal Ethics Committee Opinion 147, 113 Daily Washington Law Reporter 389 (February 27, 1983). Finally, Opinion 80-94 has been rejected by commentators, most notably by the University of Pennsylvania Law Review, 131 U. Pa. L. Rev. at 811-813.

We believe that a proper interpretation of 42 U.S.C. §§1983 and 1988 and the relevant cases support the view that there is no inherent conflict between plaintiffs and their attorneys when merits and fees are negotiated simultaneously. The essential question is whether defendant's conduct is

reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorney fees. In making such determinations, the legitimate interests of the plaintiff and his or her counsel must be balanced against the legitimate interest of the defendant in making an offer which will fix liability with considerable certainty. As set forth by the District of Columbia Subcommittee on Attorneys' Fees, supra:

> "This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff's attorney while providing some measure of relief to the client."

A rule preventing a full exchange of views in the settlement process will encourage protracted and unnecessary litigation in many instances where justice would be served by simultaneous airing of merits and fees.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

July 18, 1985.

Respectfully submitted,

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